SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

TCR SPORTS BROADCASTING HOLDING, LLP,

Petitioner,

-against-

WN PARTNER, LLC; NINE SPORTS HOLDING, LLC; WASHINGTON NATIONALS BASEBALL CLUB, LLC; THE OFFICE OF COMMISSIONER OF BASEBALL; and ALLAN H. "BUD" SELIG, AS COMMISSIONER OF MAJOR LEAGUE BASEBALL,

Respondents,

-and-

THE BALTIMORE ORIOLES BASEBALL CLUB and BALTIMORE ORIOLES LIMITED PARTNERSHIP, in its capacity as managing partner of TCR SPORTS BROADCASTING HOLDING, LLP,

Nominal Respondents.

Index No. 652044/2014
(IAS Part 41)

NOMINAL RESPONDENTS' MEMORANDUM OF LAW IN SUPPORT OF PETITIONER'S APPLICATION FOR PRELIMINARY INJUNCTION

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Nominal Respondents The Baltimore Orioles Baseball Club and Baltimore Orioles Limited Partnership ("BOLP"), both on its own behalf and in its capacity as managing partner of Petitioner TCR Sports Broadcasting Holding, LLP, respectfully submit this memorandum of law and supporting materials in support of Petitioner's application for a preliminary injunction. At the show cause hearing on August 7, 2014, this Court orally granted the Nominal Respondents permission to file papers in support of Petitioner.

NOMINAL RESPONDENTS' INTERESTS

BOLP is the managing partner of Petitioner TCR Sports Broadcasting Holding, LLP, which does business as Mid-Atlantic Sports Network ("MASN"). BOLP also owns Nominal Respondent Baltimore Orioles Baseball Club. This memorandum refers to the Nominal Respondents together as "the Orioles." As explained in MASN's submissions to the Court, the purpose of the 2005 settlement agreement ("Settlement Agreement") that created the two-Club regional sports network, renamed MASN, is to compensate the Orioles and MASN for, among other harms, the decision of Major League Baseball ("MLB" or "Baseball") to move the Washington Nationals (formerly the Montreal Expos) into the Orioles' television territory and historical markets. Because BOLP owns a supermajority of MASN and receives a proportionate share of its profits, the profits that MASN generates serve that compensatory purpose.[1]

ARGUMENT

MASN has established that it is likely to succeed in vacating the RSDC award because of pervasive conflicts of interest, intolerable self-dealing, and fraud that thoroughly infected and completely undermined any semblance of the fair and objective arbitral process to which MASN

[1] As set forth in § 2.J.3 of the Settlement Agreement and a June 30 letter from the Commissioner, the RSDC award is not final and binding as against the Orioles. *See* Affirmation of Thomas J. Hall in Supp. of TRO and PI [Doc. No. 23], Exs. 3, 16. As such, the Orioles have not moved to vacate, but have asserted in arbitration their right to de novo review. By supporting MASN's vacatur petition, the Orioles are not waiving their position that the award is not final and binding as to them, and are not waiving their right to seek de novo review or any other rights.

and its managing partner, BOLP, were entitled. Major League Baseball, its hand-picked arbitrators, and the Nationals shared not only counsel but also a financial interest in doing everything possible to undermine the promises memorialized in the Settlement Agreement, including the promise to compensate the Orioles and MASN for the loss of almost a third of their market share, business and business opportunities, and their exclusivities in the Orioles television territory. They did so, over MASN's repeated and strenuous objections, by rigging the RSDC proceeding to reach a pre-determined result—one that manifestly disregarded governing law by warping the terms of the Settlement Agreement, and that could not have been obtained through anything resembling a fair process.

MASN also has shown that it will suffer irreparable harm if the Nationals are permitted to terminate MASN's right to broadcast Nationals games, especially in the middle of the baseball season; and MASN has shown that the Nationals will suffer no material injury if an injunction is granted. Respondents do not meaningfully dispute either showing. Rather, in an attempt to stave off injunctive relief, Respondents have thrown up a host of misplaced jurisdictional and procedural objections. This Court plainly has jurisdiction to issue injunctive relief, just as it plainly has jurisdiction to vacate the RSDC award. MASN's application for a preliminary injunction should be granted.

I. This Court Has Jurisdiction to Hear this Case.

Respondents argue that the Court may not consider MASN's vacatur petition because the Court has no jurisdiction—or only very narrow jurisdiction—to review the RSDC award. Those assertions are without merit.

A. The RSDC Award is an Arbitral Award Subject to Review and Vacatur By Any Court of Competent Jurisdiction.

The Commissioner first contends that the RSDC decision is merely "a decision by an internal body of Major League Baseball"—as opposed to an arbitration award—that is not subject to review in a court. Affirmation of Kwaku A. Akowuah ("Akowuah Aff."), Ex. B (Aug. 7, 2014 Hr'g Tr. ("TRO Tr.")) 34:13–14. This newly discovered position is belied by the RSDC's own opinion and the Commissioner's prior treatment of the RSDC decision. In his entire course of dealing with the parties over the past six weeks, the Commissioner has never before stated that the RSDC decision was anything other than an arbitration award, which was precisely how the RSDC described the proceeding and its decision.

The record directly refutes the Commissioner's statement to this Court that the RSDC award is "not styled as [an arbitral award] and not described as such." TRO Tr. 41:4–5. In point of fact, the RSDC disclaimed that it was operating in its ordinary internal "capacity as the evaluator of transactions under" Baseball's revenue sharing plan, and proclaimed that it was instead acting for these purposes as the "*sole arbitrator* of any disputes regarding fair market value of the Clubs' broadcast rights" and "*the arbiter of a contractual dispute between these parties*." Akowuah Aff., Ex. A (RSDC Award) at 2 n.2 (emphasis added). In so stating, the RSDC placed express reliance on Section 2.J of the Settlement Agreement, reading that provision to reflect the parties' agreement that the RSDC "shall arbitrate the dispute." *Id.* at 2. The RSDC also maintained that "[a]ll interested parties – the Nationals, Orioles and MASN – have recognized the RSDC's authority to arbitrate this dispute pursuant to the Agreement." *Id*. The RSDC could not have stated its understanding more clearly.

The Commissioner nevertheless argues that an award is subject to judicial review "only if the parties in a writing have said it's judicially enforceable." TRO Tr. 34:18–19. But Section

2.J.3 of the Settlement Agreement says just that: it provides that the RSDC award is "final and binding" on the Nationals and MASN, and gives MASN the right to "seek to vacate or modify" the award. Affirmation of Thomas J. Hall in Supp. of TRO and PI [Doc. No. 23] ("Hall Aff."), Ex. 3 (Settlement Agreement) § 2.J.3. Nothing more is required. As numerous courts have explained, the parties' agreement that a decision "'shall be final and binding upon both parties' . . . [is] sufficient to imply consent to the entry of judgment on an arbitration award." *Milwaukee Typographical Union No. 23 v. Newspapers, Inc.*, 639 F.2d 386, 389–90 (7th Cir. 1981); *see Booth v. Hume Pub., Inc.*, 902 F.2d 925, 930 (11th Cir. 1990) ("an explicit agreement between the parties providing for judicial confirmation of an award is not an absolute prerequisite to" judicial review; the court has jurisdiction if "the parties agreed that arbitration would be final and binding").[2]

Indeed, the Commissioner's newly minted view that the RSDC award is not an arbitral award is belied by his own repeated insistence that the RSDC's conclusion is "final and binding." *See* TRO Tr. 34:23–24; Hall Aff., Ex. 16 (June 30 letter from Selig); *see also Patrolmen's Benev. Ass'n v. City of New York*, 382 N.Y.S.2d 494, 496 (1st Dep't) (where the City treated an arbitral panel's award as final and binding, it "should not now be heard to argue that the determination . . . was not in fact and law an award" subject to confirmation), *aff'd*, 41 N.Y.2d 205 (1976).

The RSDC award's arbitral character is confirmed by the Commissioner's conduct following its release. If the Commissioner actually had believed that the RSDC had bungled its assignment and erred in issuing an "arbitration" award, the natural response would have been for him to inform MASN, the Nationals, and the Orioles of that error and withdraw the report.

[2] *See also I/S Stavborg v. Nat'l Metal Converters, Inc.*, 500 F.2d 424, 426–27 (2d Cir. 1974); *Tube City IMS, LLC v. Anza Capital Partners, LLC*, No. 14-1783, 2014 WL 2605345, at *4 (S.D.N.Y. June 11, 2014); *Pa. Eng'rg Corp. v. Islip Res. Recovery Agency*, 710 F. Supp. 456, 460 (E.D.N.Y. 1989).

Instead, he did the opposite. On the very same day the RSDC issued the award, the Commissioner issued an endorsement, again using the critical language that the RSDC award would be "final and binding on the Nationals and MASN." Hall Aff., Ex. 16.

The Commissioner also failed to voice any concern about a supposed RSDC overreach during the entire month of July, even as MASN and the Nationals repeatedly expressed their understanding that the RSDC had issued an arbitration award. For example, on July 2, 2014, just two days after the RSDC issued its award, MASN petitioned this Court to vacate it. *See* Summons with Notice [Doc. No. 1]. The Commissioner did not respond by saying that there was no arbitration award to vacate. On July 18, 2014, the Nationals also turned to this Court, invoking federal and state arbitration acts and asking the Court, both in this case and in a separate petition (since withdrawn), to confirm the RSDC award. *See* Notice of Verified Pet. to Confirm [Doc. No. 3]. Again, the Commissioner voiced no objection to the Nationals' understanding of what the RSDC had done. Nor did he indicate in any subsequent correspondence with the parties that there was no arbitration award, and thus nothing for a court to vacate or confirm. The Commissioner's belated assertion that the RSDC decision is not an arbitral award should be rejected.

Moreover, if the Commissioner really believed that the RSDC decision is not an arbitration award, he should have filed in *support* of MASN's application for a preliminary injunction. The issue here is whether the Nationals should be temporarily enjoined from terminating MASN's right to telecast Nationals baseball games until the parties' respective rights under the Settlement Agreement are resolved. Among other arguments, MASN has contended that it is premature for the Nationals to exercise any termination right premised on the RSDC award because the validity of that award is the subject of pending challenges in this Court and

before AAA. *See* Pet'r's Mem. of Law in Supp. of TRO and PI [Doc. No. 47] ("TRO Mem.") at 1–2.

The Commissioner's position is different, but with respect to the preliminary injunction, it should lead to the same place: According to the Commissioner, (1) the RSDC decision is merely "an internal decision by a body of Major League Baseball," TRO Tr. 34:13–14; (2) it is not an award that can be confirmed by a court and reduced to judgment, *id.* at 35:23–24; (3) and it is subject to vacatur or further modification, *id.* at 34:23–35:3. If that is really the Commissioner's view, then he should agree with MASN that it is premature for the Nationals to exercise any termination right. But as should be clear to this Court, the Commissioner's sole focus has been to avoid any and all judicial scrutiny of Baseball's conduct with respect to the RSDC. And for good reason—that conduct cannot withstand any such scrutiny.

B. The Court's Statutory Authority to Vacate Or Modify an Arbitration Award Cannot Be Constrained By Contract.

The Nationals have asserted that Section 2.J.3 of the Settlement Agreement restricts MASN to challenging the RSDC award for "corruption, fraud or miscalculation of figures." TRO Tr. 28:4–5. Vacatur would be justified even under that standard on the facts of this case. But MASN is not limited to challenging the RSDC award on those grounds. Instead, MASN has an absolute and unwaivable right to raise any of the grounds for vacatur established by the Federal Arbitration Act (which mirror the grounds provided in CPLR § 7511). These grounds for vacatur represent "a floor for judicial review of arbitration awards below which parties cannot require courts to go, no matter how clear the parties' intentions." *Hoeft v. MVL Grp., Inc*., 343 F.3d 57, 63–64 (2d Cir. 2003). Put another way, federal law establishes "grounds for vacatur of an arbitration award . . . [that] are not waivable, or subject to elimination by contract." *In re Wal-Mart Wage & Hour Emp't Practices Litig*., 737 F.3d 1262, 1268 (9th Cir. 2013).

Consequently, the RSDC award is subject to vacatur on any of the following grounds: manifest disregard of the law, *see First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995); corruption or fraud; evident partiality; prejudicial misconduct; or an *ultra vires* or flawed execution of the arbitrators' powers, *see* 9 U.S.C. § 10(a)(1)–(4).

II. MASN is Entitled to a Preliminary Injunction Barring Respondents from Terminating or Interfering with Its Right to Broadcast Nationals Games.

The Court should enjoin Respondents from interfering with or terminating MASN's right to broadcast Nationals games because MASN has shown that it is likely to succeed in vacating the RSDC award and that it, along with the Orioles, would be irreparably harmed by a termination of its broadcast rights while this action is pending. "A preliminary injunction requires a showing of probability of success, danger of irreparable injury in the absence of an injunction, and a balance of the equities in the plaintiff's favor." *Abacus Fed. Sav. Bank v. Lim*, 778 N.Y.S.2d 145, 146 (1st Dep't 2004). MASN has met all of these requirements. Indeed, injunctive relief would be justified even if the Court were to find that there are unresolved questions going to the merits, because here an injunction "is necessary to preserve the status quo and the party to be enjoined will suffer no great hardship as a result of its issuance." *Mr. Natural, Inc. v. Unadulterated Food Prods., Inc.*, 544 N.Y.S.2d 182, 183 (2d Dep't 1989) (reversing denial of a preliminary injunction despite "a factual dispute that made the plaintiff's likelihood of success on the merits difficult to determine," because termination of the parties' contracts would place "the plaintiff in real danger of losing its business").

Termination of MASN's right to broadcast Nationals games in the middle of the baseball season would be catastrophic for MASN and the Orioles. The impact on fans, advertisers, and MASN's distributors would be chaotic and irreparable. By contrast, a delay would cause no material harm to the Nationals. Accordingly, even if the Court were to conclude that "plaintiff's

likelihood of success on the merits [is] difficult to determine," it would remain appropriate for the Court to issue an injunction. *See id.*; *see also Republic of Lebanon v. Sotheby's*, 561 N.Y.S.2d 566, 568–69 (2d Dep't 1990) ("Where denial of injunctive relief would render the final judgment ineffectual, the degree of proof required to establish the element of likelihood of success on the merits should be accordingly reduced.").

A. MASN is Likely to Prevail on the Merits.

As MASN's petition and supporting materials establish, the RSDC process was fatally flawed and plagued by conflicts of interest. The RSDC members themselves—representatives of Major League Clubs that receive large amounts of revenue sharing money from more financially successful clubs—had a vested interest in diverting money from MASN's profits into telecast rights fees, because a substantial portion of those fees are diverted to revenue-sharing beneficiaries such as the Pittsburgh Pirates and Tampa Bay Rays. In addition, the same law firm that represented the Nationals in the arbitration also represented the clubs of all three RSDC members and Baseball itself while the RSDC arbitration was pending and failed to fully disclose those obvious conflicts of interest. Moreover, the RSDC simply refused to apply the established methodology for determining the fair market value of the teams' telecast rights, which Baseball agreed to do in the Settlement Agreement. *See* Hall Aff., Ex. 3, § 2.J.3 ("the fair market value of the Rights shall be determined by the [RSDC] using the RSDC's established methodology for evaluating all other related party telecast agreements in the industry"). And Baseball—which appointed its own high-ranking executives to staff and direct the RSDC, and had its own contractual duty to "effectuate and enforce" the Settlement, *id.* § 7—never instructed the RSDC to use the "established methodology" nor took any steps to cure the process or decision. Instead, Baseball furthered its own economic self-interest by approving a process that jettisoned the promised "established methodology" and simply "backed into" the greater amount of telecast

fees that MLB wanted MASN to pay—and, perhaps promised MASN would pay—to the Nationals.[3] Verified Pet. to Vacate [Doc. No. 51] at 65; TRO Mem. at 13.

Any of these grounds would support vacatur of the award under the Federal Arbitration Act, 9 U.S.C. § 1 *et seq*., and CPLR § 7511, and the Orioles fully adopt MASN's arguments for vacatur under those provisions. As explained below, Respondents' attempts to evade those arguments are unsuccessful.

1. Neither the Settlement Agreement nor the Major League Constitution Precludes this Action.

The Commissioner asserts that the Settlement Agreement and the Major League Constitution bar MASN from seeking judicial review of the RSDC award. These arguments ignore MASN's rights under the FAA and depend on a profound misreading of the Settlement Agreement. First, the Commissioner claims that the parties have agreed, under Section 8 of the Settlement Agreement, to pursue any challenges to the RSDC award via AAA arbitration rather than in court. TRO Tr. 35:4–16. Second, he says that the Major League Constitution "prohibits clubs from litigating disputes between themselves . . . or with Major League Baseball in the courts." TRO Tr. 41:7–9. Both arguments fail for essentially the same reason: "Since . . . courts are not rubber stamps, parties may not, by private agreement, relieve them of their obligation to review arbitration awards for compliance with" the Federal Arbitration Act. *Hoeft*, 343 F.3d at 64; *see also In re Wal-Mart*, 737 F.3d at 1268 (statutory grounds for vacatur of arbitral awards "are not waivable, or subject to elimination by contract"). For that reason, neither the Settlement Agreement nor the Major League Constitution—which is simply a contract, *see Charles O. Finley & Co., Inc. v. Kuhn*, 569 F.2d 527, 533 (7th Cir. 1978) (noting that the league's

[3] Further, upon information and belief, written correspondence between Baseball and the Nationals in or about July 2013 confirms that Baseball made a $25 million payment to the Nationals around the same time, which was repayable only to the extent that the Nationals recovered funds from MASN under a favorable RSDC decision. The Orioles have requested that Baseball and the Nationals produce any such communications.

predecessor agreement was a contract)—could preclude MASN from seeking to vacate the RSDC award in court. *See Hoeft*, 343 F.3d at 63–64.

These arguments also fail even on their own terms. To be sure, Section 8 of the Settlement Agreement sets forth a dispute resolution process, requiring mediation and arbitration before AAA, that is exclusive with respect to *certain* "disputes arising under" the Agreement. But Section 8 does not provide the exclusive mode of proceeding for disputes between MASN and the Nationals over the amount of telecast rights fees. Such disputes are instead addressed as an initial matter under Section 2.J.3 (which sets forth the RSDC process). And as to such disputes, the Settlement Agreement does not mandate mediation and arbitration as the only appropriate next step. *See* Hall Aff., Ex. 3, § 8 (Section 8's exclusivity requirement applies "[e]xcept as otherwise provided in . . . [§] 2.J"). At the August 7, 2014 TRO hearing, neither the Nationals' nor the Commissioner's counsel acknowledged the existence of this obviously relevant language. Neither did they acknowledge the language giving MASN the right to "seek to vacate or modify" the RSDC award and thus, unambiguously, to seek judicial review of such an award. *Id.* § 2.J.3. These provisions directly contradict the Commissioner's assertion that Section 8 provides "the exclusive venue for challenging the RSDC's decision." TRO Tr. 41:17–18.

Likewise, the Major League Constitution does not govern this dispute. According to the Commissioner, Article VI of that agreement prohibits Major League Clubs from litigating with each other or with Baseball in the courts. TRO Tr. 41:7–9. But MASN is not a Major League Club, is not a party to the Major League Constitution, and has never agreed to be bound by that contract. Thus, the Major League Constitution cannot bar MASN from having its day in court.[4]

[4] The Commissioner has asserted that MASN is covered by Article VI because it is a partnership between two Major League Clubs. That position directly conflicts with Maryland law, which governs the Settlement Agreement

Moreover, Article VI of the Major League Constitution does not override the process for resolving disputes over telecast rights fees set forth in Section 2.J.3 of the Settlement Agreement. The Commissioner expressly warranted that MASN's rights under the Settlement Agreement were not inconsistent with any preexisting contract, which includes the MLB Constitution. Hall Aff., Ex. 3, § 7 (Baseball warrants that "neither the terms of this Agreement, nor the execution of this Agreement by it, nor the performance of its obligations hereunder conflicts with any contract, agreement, undertaking or understanding to which it is a party"). The Commissioner's current argument that the Constitution overrides Section 2.J.3 is squarely contrary to his commitment in Section 7 of the Settlement Agreement and should be rejected.

2. Major League Baseball's Status as a Private Organization Does Not Make its Actions Immune to Judicial Scrutiny.

The Commissioner also has asserted that the Court should not grant injunctive relief here because "the courts defer to private arrangements and organizations like Major League Baseball." TRO Tr. 32:8–9. The New York courts do recognize a limited principle of non-interference with the internal affairs of private associations, but that principle is centered largely on an understanding that basic internal issues like the outcome of a sporting competition or closely collateral matters like the disposition of draft picks should not be relitigated in the courts. *See Mercury Bay Boating Club Inc. v. San Diego Yacht Club*, 76 N.Y.2d 256, 265 (1990) (dispute over fairness of yacht race); *cf. Crouch v. NASCAR, Inc.*, 845 F.2d 397, 401–03 (2d Cir. 1988) (league scoring decision in a stock car race); *Koszela v. NASCAR, Inc.*, 646 F.2d 749, 754 (2d Cir. 1981) (similar). That doctrine does not stretch nearly far enough to aid the

(per § 11) and provides that "[a] partnership is an entity distinct from its partners." *Wildwood Med. Ctr., L.L.C. v. Montgomery Cnty.*, 954 A.2d 457, 464 (Md. 2008) (quoting Md. Code, Corps. & Ass'ns Art. § 9A-201). MASN accordingly cannot have become a party to a contract among and between the Major League Clubs simply because the Orioles or Nationals have assented to its terms.

Commissioner here. This case does not involve any question about, for example, how many wild-card teams should make the playoffs or whether designated hitters may be used in World Series games. It concerns a dispute over television broadcast rights fees, worth many millions of dollars, that arises between businesses that signed a contract to settle a significant legal dispute and to govern their future commercial relations. The parties here happen to be involved in professional baseball, but the legal questions that MASN has asked this Court to address are no different from many other business disputes that are regularly presented to this Court. Those legal questions are eminently "suitable for judicial resolution." *Mercury Bay Boating Club Inc.*, 76 N.Y.2d at 265.

Moreover, the non-interference principles that the Commissioner cites are far more limited than he concedes. For one, the New York courts carefully enforce the "fundamental" requirement that a "hearing before a voluntary association must . . . be fair and impartial." *Lindemann v. Am. Horse Shows Ass'n, Inc.*, 624 N.Y.S.2d 723, 730 (Sup. Ct. N.Y. Co. 1994); *see also Singh v. PGA Tour, Inc.*, 42 Misc. 3d 1225(A), at *13–14 (Sup. Ct. N.Y. Co. 2014) (declining to apply the non-interference doctrine where the plaintiff alleged that the defendant's conduct was tortious and breached contractual duties). Thus, where an organizational decisionmaker "may have had a direct interest in the underlying dispute," the tribunal's "fairness and impartiality" are open to judicial scrutiny. *Bloch v. Veteran Corps of Artillery*, 402 N.Y.S.2d 200, 202 (1st Dep't 1978). Courts also will carefully review arbitrary, harmful acts, *Jacobson v. N.Y. Racing Ass'n, Inc.*, 33 N.Y.2d 144, 150 (1973), and will take action against organizational rules and practices that contravene state law, *Hammer v. Am. Kennel Club*, 758 N.Y.S.2d 276, 278 (1st Dep't), *aff'd*, 1 N.Y.3d 294 (2003).

Courts have also emphasized that the non-interference principle, which originated over a century ago with "social clubs, religious organizations and fraternal associations," has far less force—and can work far more mischief—when applied to modern, for-profit trade and industry organizations that "exercise[e] virtually monopolistic control." *Lindemann*, 624 N.Y.S.2d at 731. "Where an organization," such as Baseball, "has achieved such a 'stranglehold,' rigid adherence to a 'hands off' policy is inappropriate." *Koszela*, 646 F.2d at 754. For all of these reasons, principles of non-interference have no role to play in this case.

3. The Pending Arbitration Demand Does Not Preclude This Court from Granting Preliminary Injunctive Relief.

The Commissioner next asserts that a pending AAA arbitration, which MASN and the Orioles filed against Baseball, the Commissioner, and the Nationals on July 2, 2014, precludes this action because MASN and the Orioles "can't be litigating in court at the same time they're in the arbitra[l] forum." TRO Tr. 41:15–19. But the specific issue currently before this Court—whether the Nationals should be enjoined at this time from terminating MASN's right to telecast Nationals games—has not been raised in the arbitration, for which no panel has yet been constituted. Further, the Nationals have not acknowledged that they are subject to the jurisdiction of the AAA panel, and they have even gone so far as to suggest that it would be "nonsensical" for them to engage in AAA arbitration. In this context, there is no cause for the Court to stay its hand in deference to arbitration.[5]

[5] The Commissioner also argued at the TRO hearing that MASN had improperly delayed pursuing its challenge to the fairness of the RSDC process and in seeking relief from this Court. That argument has no basis in fact or law. It has no basis in fact because MASN initiated its vacatur action just *two days* after the RSDC issued its award and then—in the face of unrelenting threats by the Commissioner—timely filed its full petition four weeks later on July 28, 2014. Moreover, "[m]ere delay, without the necessary elements creating an equitable estoppel, does not preclude the grant of an injunction." *N.Y. Real Estate Inst., Inc. v. Edelman*, 839 N.Y.S.2d 488, 489 (1st Dep't 2007) (citing *Hay Group v. Nadel*, 566 N.Y.S.2d 616, 618 (1st Dep't 1991)). The Commissioner has not even attempted to establish that equitable estoppel could apply on these facts, let alone that estoppel principles could provide an appropriate basis for withholding judicial review of an arbitration award under federal or state law.

4. MASN Raised and Preserved Its Objections To The Obvious Procedural Shortcomings of the RSDC Arbitration Proceeding.

The Commissioner contends that, during the RSDC proceeding, MASN knew of the procedural defects and conflicts of interest it has now asserted, but did nothing to raise those issues at the time. TRO Tr. 42:5–15. Nothing could be further from the truth. One of the most grievous problems with the RSDC process, which thoroughly compromised its integrity, was the fact that the same law firm—and even some of the same lawyers within that firm—simultaneously represented the Nationals, Baseball, and the clubs of all three RSDC members. MASN persistently objected, demanded more information, and even moved to disqualify the firm, only to be rebuffed at every turn. MASN was kept largely in the dark about the unseemly web of relationships that infected and compromised the arbitral process with conflicts of interest, partiality, and self-dealing.

The RSDC arbitration proceedings began on January 5, 2012. Proskauer Rose LLP ("Proskauer") advised MASN and BOLP that it expected to represent the Nationals in the arbitration. This raised immediate red flags because the firm also represented Baseball, the Commissioner, and Baseball's Labor Relations Committee. On January 23, 2012, counsel for BOLP wrote to Proskauer, pointing out that its "representation of MLB and various MLB Clubs . . . raises questions of impartiality, prejudice and unfair advantage." Affirmation of Aron U. Raskas In Support Of Motion For Preliminary Injunction ("Raskas Aff."), ¶ 3, Ex. 3 (January 23, 2012 letter from Rifkin to Leccese). Counsel for BOLP expressed this concern directly to Baseball's General Counsel as well, and requested information regarding the scope of Proskauer's involvement with Baseball and other Clubs, including those represented on the RSDC. Raskas Aff., ¶ 4, Ex. 4 (January 23, 2012 e-mail exchange between Rifkin and Ostertag). Baseball's General Counsel declined to provide any information about individual MLB Club

representations, directing BOLP to inquire with the Clubs themselves. *Id.* Proskauer's response also left much to be desired: The firm contended that its concurrent representations of Baseball, the Commissioner, and the Labor Relations Committee were immaterial because it had not represented the RSDC itself, and it failed to address whether it was concurrently representing any other MLB Clubs. Raskas Aff., ¶ 5, Ex. 5 (January 24, 2012 letter from Leccese to Rifkin).

On January 27, 2012, MASN's counsel wrote to Proskauer to object to Proskauer's representation of the Nationals. Raskas Aff., ¶ 8, Ex. 8 (January 27, 2012 letter from Frederick to Leccese). MASN's counsel explained that it was not "appropriate for a firm that represents the decision-maker in the instant dispute also to represent a litigant before that decision-maker." *Id.* Proskauer again responded with blanket denials. Raskas Aff., ¶ 9, Ex. 9 (January 31, 2012 letters from Leccese to Rifkin and Frederick). Left with no choice, on February 1, 2012, BOLP and MASN petitioned Baseball and the RSDC to disqualify Proskauer. Raskas Aff., ¶ 10, Ex. 10 (February 1, 2012 letter from Rifkin to Leccese). The disqualification petition stated that, despite inquiries, the full scope of Proskauer's concurrent representations was unknown to MASN and BOLP, but was clearly improper. MASN and BOLP thus "request[ed] that the RSDC preclude Proskauer from participating in this proceeding. Anything less would be procedurally and substantively inappropriate and compromise the integrity" of the proceedings. Raskas Aff., ¶ 11, Ex. 11.

During a February 2, 2012 pre-hearing conference before the RSDC and representatives of Baseball, including Baseball's Chief Operating Officer, Robert Manfred, Jr., MASN and BOLP raised their request to disqualify Proskauer. Affidavit of Michael J. Haley ("Haley Aff."), ¶¶ 5–6. They reiterated the objections set forth in their February 1 petition and informed Mr. Manfred that they could not be confident Proskauer or Baseball had disclosed all relevant

relationships. *Id.* ¶ 7. Mr. Manfred, however, stated that he did not believe that he had the authority or the responsibility to "tell the Nationals who can and cannot represent them." *Id.* ¶ 8. He never denied that a conflict existed. *Id.* Rather, he denied the request because he believed that the RSDC arbitrators "did not have the authority" to grant it. *See* Raskas Aff., ¶ 12, Ex. 12 (February 16, 2012 e-mail from Rifkin to Manfred); *see also* Haley Aff. ¶ 8. And even after MASN and BOLP had raised the issue repeatedly, Baseball did nothing to empower the RSDC to decide the disqualification request.

Mr. Rifkin then asked Mr. Manfred for the right to ask the RSDC members about their relationships with Proskauer, as Baseball's General Counsel had told Mr. Rifkin to do, but Mr. Manfred said that he could not. Haley Aff. ¶ 9. Mr. Frederick and Mr. Rifkin then asked that Mr. Manfred and MLB promptly disclose all of Proskauer's relationships with MLB and the RSDC, including with the panel members' Clubs, and further asked that their objections be made known to the RSDC. *Id.* Neither Mr. Manfred nor MLB did so. *Id.* ¶ 11.

Proskauer thus continued to represent the Nationals in the arbitration. MASN and BOLP—still unaware of the full extent of the conflict—recorded for Mr. Manfred their continuing objection to Proskauer's role. Raskas Aff., ¶ 13, Ex. 13 (February 6, 2012 e-mail from Frederick to Manfred). They were very clear about the nature and basis of their objection, writing to one Proskauer attorney in February 2012: "By no means have the Orioles and [MASN] consented to Proskauer's representation of the Nationals in these proceedings, which we believe is highly inappropriate and improper . . . ." BOLP's counsel also pointed out that "the Orioles and [MASN] have a continuing objection and have preserved and reserve all rights, claims, causes of actions and privileges, and expressly waive none." Raskas Aff., ¶ 14, Ex. 14 (February 15, 2012 e-mail from Rifkin to Scullion and other Proskauer counsel, with copies to

Manfred and Frederick). And to Mr. Manfred, BOLP's counsel reiterated that the "Orioles and [MASN] have an absolute right to a fair and objective hearing not tainted by the shadow of MLB's lawyers, who, among other things, also represent a party in this proceeding." Raskas Aff., ¶ 15, Ex. 15 (February 16, 2012 e-mail from Rifkin to Manfred).

MASN and BOLP made their substantive written submissions to the RSDC on March 7, 2012, repeating yet again their objection to Proskauer's representation of the Nationals. Raskas Aff., ¶ 16, Ex. 16 (BOLP Submission Statement, March 7, 2012, at 1 n.4); Raskas Aff., ¶ 17, Ex. 17 (MASN Submission Statement, March 7, 2012, at 1 n.1). On March 23, 2012, BOLP delivered the Orioles Reply Submission Statement to the RSDC. By then, BOLP and MASN had learned that Proskauer was concurrently representing the Office of the Commissioner of Baseball in matters related to the Los Angeles Dodgers' Chapter 11 bankruptcy proceedings, identifying itself as "Counsel to the Office of the Commissioner of Baseball." BOLP made clear that Proskauer's "participation in these proceedings on behalf of the Nationals, while concurrently representing MLB, including as to matters relating to the value of the Dodgers' telecast rights and other MLB Clubs, including at least one Club represented on this RSDC, is improper and highly prejudicial and taints these proceedings." Raskas Aff., ¶ 18, Ex. 18 (Orioles Reply Submission Statement, March 23, 2012, p. 1, n. 7).

The RSDC hearing took place on April 3, 2012. At the outset, BOLP and MASN restated their continuing objection and noted that Proskauer's and MLB's many conflicts of interest thoroughly tainted the proceedings. Haley Aff., ¶ 13. The RSDC and MLB again refused to disqualify Proskauer and instead proceeded to hear argument from Proskauer attorneys. At the same time, MLB and the RSDC continued not to disclose that Proskauer was simultaneously serving as counsel for each and every one of them in one or more matters. *See*

id. ¶ 11. Following the hearing, MASN and BOLP again objected to Proskauer's participation in the proceedings, as well as the composition of the RSDC panel, and "expressly reserve[d] all rights, waiving none, *to challenge the record of the proceedings, as well as the regularity of its procedures and the constitution of its panel, in the appropriate forum*, should that become necessary." Raskas Aff., ¶ 19, Ex. 19 (April 7, 2012 e-mail from Frederick to Manfred) (emphasis added).

It was only after the arbitration hearing that MASN and BOLP learned that the minimal information Proskauer, Baseball, and the RSDC had disclosed about Proskauer's multiple representations had been woefully incomplete. *See* Haley Aff. ¶ 11. In response to a January 25, 2012 inquiry from BOLP's counsel, Baseball's Executive Vice President disclosed that the Rays, Pirates, and Mets would be represented on the RSDC panel and, as to the question of potential conflicts, revealed only that "Proskauer does salary arbitration for [T]ampa." Raskas Aff., ¶ 6, Ex. 6. But neither Baseball, nor Proskauer, nor Stuart Sternberg, the Principal Owner of the Rays who served on the RSDC, disclosed anything further. Haley Aff., ¶ 11. In fact, during the RSDC process, Proskauer was also serving as counsel to the Rays in a salary arbitration with one of its players, Jeff Niemann. Hall Aff., ¶ 9, Ex. 8. Proskauer had also represented the Rays in another salary arbitration just two years earlier regarding a second player, B.J. Upton. Hall Aff., ¶ 10, Ex. 9. Sternberg did not disclose any information about the fact that Proskauer was representing his Club even while the RSDC arbitration was proceeding. Haley Affidavit, ¶ 11. Nor did he recuse himself. And despite knowing full well that Proskauer had an ongoing relationship with the Rays, Baseball still allowed Sternberg to serve as one of the RSDC arbitrators without disclosing, or compelling him to disclose, the full extent of that relationship.

Also undisclosed to MASN and BOLP was that, in June 2012, Proskauer appeared on behalf of the Pittsburgh Pirates, along with Baseball, in defending a lawsuit in the Southern District of New York, *Garber v. Office of the Commissioner of Baseball, et al*., No. 12-03704 (S.D.N.Y.). Hall Aff., ¶ 11, Ex. 10. At that time, the Pirates' President was one of the three RSDC Arbitrators. Proskauer partner Bradley Ruskin—who served as the Nationals' lead counsel in the RSDC arbitration—represented both the Pirates and MLB in that case. *Id.* Proskauer's involvement in *Garber* is particularly significant here given that it involves antitrust challenges to the way Baseball structures telecast rights. *See Lerner v. Office of the Commissioner of Baseball*, No. 12-03704 (S.D.N.Y. Aug. 8, 2014), ECF. No. 316.

As if all of that were not unseemly enough, in an brazen step, while the arbitration was pending, Proskauer appeared as counsel for Mets owners Sterling Equities Associates ("Sterling") and Fred Wilpon in *Goldweber v. Sterling Equities Associates*, No. 10-5786 (S.D.N.Y.), a class action arising out Sterling's investments in the Madoff Ponzi scheme. Hall Aff., ¶ 12, Ex. 11. Jeff Wilpon (one of the RSDC arbitrators) is Fred Wilpon's son, and both are Sterling executives. Thus, at the time that Proskauer was representing the Nationals before the RSDC, and Jeff Wilpon was serving on the RSDC, Proskauer was representing both Jeff Wilpon's company and his father in an action that involved potentially substantial liability. Remarkably, these relationships remained concealed, even in the face of repeated, persistent efforts by MASN and BOLP to learn the nature and extent of any possible conflicts.

Press reports from 2011 reflect that Baseball made a $25 million loan to the Mets ownership in light of their losses in the Madoff Ponzi scheme. Hall Aff., ¶ 14, Ex. 13. It is possible that Proskauer also represented the Mets' ownership in connection with that loan. But

MASN and BOLP remain in the dark, as no disclosure of any Proskauer relationships was made in connection with the RSDC arbitration. Haley Aff., ¶ 11.

In May 2014, about a month before the RSDC issued its June 30, 2014 award, Proskauer appeared in *Senne v. Officer of the Commissioner of Baseball*, 3:14-cv-00608 (N.D. Calif.), which commenced on February 7, 2014. Hall Aff., ¶ 15, Exs. 14 and 15. In that ongoing litigation, Proskauer represents not only Baseball and the Nationals, but also the Mets, the Pirates, and the Rays—the Clubs that the three RSDC arbitrators either own or control. Further, MASN and BOLP have now learned that Proskauer has represented MLB or related parties in a significant number of additional cases.[6]

Thus, the Nationals' counsel had all their bases covered. During the course of the RSDC arbitration and before any award was issued, Proskauer had attorney-client relationships with Baseball, the Nationals, and all three MLB Clubs whose owners or representatives served on the RSDC. Proskauer was representing everyone in the room—except, of course, MASN and BOLP. And MASN and BOLP timely and repeatedly objected to that fact. Any suggestion that

[6] Raskas Aff., ¶ 20, Exs. 20 through 32; *see Rodriguez v. Major League Baseball*, No. 14-v-00244 (S.D.N.Y. filed Jan. 13, 2014) (Major League Baseball, Office of the Commissioner, Major League Players Association); *Garber v. Office of the Commissioner of Baseball*, No. 13-mc-91264 (D. Mass. filed November 4, 2013) (Office of the Commissioner of Baseball, Major League Baseball Enterprises, Inc., MLB Advanced Media, L.P., MLB Advanced Media, Inc.); *Pena v. The Office of the Commissioner of Baseball,* No. 652848/2013 (Sup Ct. N.Y. Co. filed Aug. 14, 2013) (Marks, J.) (Office of the Commissioner of Baseball); *Chen v. Major League Baseball Properties, Inc*., No. 13-cv-05494 (S.D.N.Y. filed Aug 07, 2013) (Major League Baseball, Major League Baseball Properties, Inc., Office of the Commissioner of Baseball, Major League Baseball Enterprises, Inc.); *City of San Jose et al. v. Office of the Commissioner of Baseball*, No. 13-cv-02787 (N.D. Ca. filed June 18, 2013) (Office of the Commissioner of Baseball, Allan H. "Bud" Selig); *Office of the Commissioner of Baseball v. Sitrick,* No. 13-cv-07990) (S.D.N.Y. filed November 8, 2013) (Office of the Commissioner of Baseball); *Rodriguez v. Major League Baseball*, No. 11-cv-02628 (S.D.N.Y. filed Apr. 18, 2011) (Major League Baseball, Office of the Commissioner of Baseball, Major League Baseball Players Association); *Diaz v. Major League Baseball Enterprises, Inc*., No. 11-cv-04273 (S.D.N.Y. filed June 23, 2011) (Major League Baseball Enterprises Inc., Office of the Commissioner); *Anheuser-Busch, Inc. v. Major League Baseball Properties, Inc.,* No. 10-cv-08513 (S.D.N.Y. tiled Nov. 12, 2010) (Major League Baseball Properties, Inc.); *Moran v. Selig*, No. 03-cv-07424 (C.D. Cal. Filed Oct 16, 2003) (Allan "Bud" Selig); *Morioka v. M.L.B.,* et al., No. 03-cv-08161 (S.D.N.Y. filed Oct 16, 2003) (Major League Baseball, Baseball Television, Inc.); *Office of the Comm. v. World Umpires Assoc.,* No. 02-cv-05538 (S.D.N.Y. filed July 18, 2002) (Office of the Commissioner of Baseball); *Office of Baseball v. Major League Umpires*, No. 02-cv-00696 (E.D. Pa. filed February 8, 2002) (Office of the Commissioner of Baseball, American League of Professional Baseball Clubs, National League of Professional Baseball Clubs).

they waived or slept on their rights is pure fiction. What the record instead establishes as fact is a systematic effort to maintain and conceal a web of conflicting attorney-client relationships that was wholly inconsistent with any appropriate standard of impartiality in an alternative dispute forum or in a court. *See* TRO Mem. at 8–12. No decision flowing from such a tainted process should be treated as enforceable by a court of law.

B. MASN Will Suffer Irreparable Harm Absent a Preliminary Injunction.

MASN has already explained, in detail and without contradiction, that it will suffer irreparable harm unless the Nationals and Baseball are enjoined from terminating MASN's right under the Settlement Agreement to broadcast Nationals games. Numerous courts have recognized that "[s]uch interference with an ongoing business, particularly one involving a unique product and an exclusive licensing and distribution arrangement, risks irreparable injury and is enjoinable." *U.S. Ice Cream Corp. v. Carvel Corp.*, 523 N.Y.S.2d 869, 871 (2d Dep't 1988); *see also Reuters Ltd. v. United Press Int'l, Inc.,* 903 F.2d 904, 907–08 (2d Cir. 1990). Nationals games plainly qualify as "a unique product"; if the telecast rights were terminated, there would be no available substitute.

Respondents have not attempted to rebut this showing of irreparable harm. Instead, they have suggested that MASN will suffer no irreparable harm absent an injunction because, if MASN simply pays the Nationals the amounts they are supposedly due, the Nationals will not terminate the contract and no harm will befall MASN. *See* TRO Tr. 22:7–8, 29:16–21, 39:5–15. That position turns the irreparable harm analysis on its head. No principle of law or equity forbids a court from granting an injunction to a party who faces a demand of "your money or your life," simply because the party pressing the demand claims the money is all he really wants. To the contrary, the very purpose of a preliminary injunction is to maintain the status quo until a court can determine the parties' respective legal rights. *Olympic Tower Condo. v. Cocoziello*,

761 N.Y.S.2d 179, 180 (1st Dep't 2003); *Cearley v. Eli Haddad Corp.*, 469 N.Y.S.2d 365, 366 (1st Dep't 1983). For that reason, the status quo is the baseline for measuring irreparable harm. *Cf. XL Specialty Ins. Co. v. Level Global Investors, L.P.*, 874 F. Supp. 2d 263, 272 (S.D.N.Y. 2012) (status quo to be maintained by preliminary injunction was the parties' prior course of dealing, before the defendant's unilateral termination of their relationship). And the status quo here is that MASN holds the rights to telecast Nationals games.

Indeed, courts have repeatedly rejected the view that an injunction should not issue simply because the plaintiff could in theory yield to the defendant's threat to inflict irreparable harm and make payments instead. For example, in *Level 3 Commc'ns, LLC v. Tel. Operating Co. of Vt., LLC*, No. 11-280, 2011 WL 6291959 (D. Vt. Dec. 15, 2011), the plaintiff sought to enjoin the defendant from enforcing an embargo against the plaintiff's business, which was prompted in part by a dispute over whether certain payments were due. It was undisputed that the plaintiff "could avoid imminent and actual harm by paying the disputed amounts under protest." *Id.* at *12. Nevertheless, the court observed that "it would be unjust to require a party, who is entitled to withhold payment for charges that are the subject of a good faith dispute, to simply pay those charges anyway in order to continue services." *Id.* The same result should hold here. As in *Level 3*, this Court should not "deny injunctive relief simply because [MASN] has the financial capacity to pay amounts it does not owe in order to avoid [a termination] that it should not face." *Id.*; *see also Eberspaecher N. Am., Inc. v. Nelson Global Products, Inc.*, No. 12-11045, 2012 WL 1247174, at *5–6 (E.D. Mich. Apr. 13, 2012) (rejecting the "troubling" argument that the plaintiff could avoid irreparable harm by paying the higher prices demanded by the defendant and thereby avoid irreparable harm); *Teamquest Corp. v. Unisys Corp.*, No. 97-3049, 2000 WL 34031793, at *13 (N.D. Iowa Apr. 20, 2000) (granting a preliminary injunction

to prevent termination of a licensing agreement to sell unique software products, notwithstanding the defendant's offer to continue selling to the plaintiff at "exorbitant" prices).

C. The Balance of Equities Sharply Favors MASN.

Balanced against the irreparable harm MASN would suffer from termination, the Nationals assert only that a temporary delay in their ability to terminate the telecast rights—where their right to do so is at the heart of this dispute—would irreparably harm their alleged contractual rights. *See* TRO Tr. 30:8–11 (arguing that "bargained-for minority rights, like the right to terminate, are very important to the balance of power in a relationship, and abrogating them is what constitutes irreparable harm"). That argument does not come close to tipping the balance of equities in favor of the Nationals. *See Ma v. Lien*, 604 N.Y.S.2d 84, 85 (1st Dep't 1993) ("the 'balancing of the equities' . . . simply requires the court to look to the relative prejudice to each party accruing from a grant or a denial of the requested relief"). A brief delay pending final adjudication is hardly an abrogation, and it will cause no harm to the Nationals.

Moreover, the authorities on which the Nationals rely are inapposite. In *Empresas Cablevision v. JPMorgan Chase Bank, N.A.*, 680 F. Supp. 2d 625 (S.D.N.Y.), *aff'd and remanded*, 381 F. App'x 117 (2d Cir. 2010), the plaintiff faced irreparable harm because of a threat to override its contractual "right to veto certain transactions with which it disagreed before those transactions commenced." *Id.* at 633 (citation omitted). The harm was irreparable only because the ability to veto a pending transaction is, by nature, fleeting. *See id.* Not so here; temporarily preventing the Nationals from terminating the telecast rights now will have no impact on their ability to do so later, in the unlikely event that they have such a right. The Nationals' reliance on *Sportschannel Assocs. v. Sterling Mets, L.P.*, 5 Misc. 3d 1029(A), 2004 WL 2921859 (Sup. Ct. N.Y. Co. Dec. 16, 2004), is equally misplaced. The question there was whether the Mets could begin negotiating with other broadcasters after exercising their

termination option but before the contract term actually ended. *Id.* at *1, *3. Critically, all parties *conceded* in that case that the Mets had acted appropriately in terminating the contract. *See id.* at *1. *Sportschannel* accordingly has nothing to say about whether an injunction should issue in the circumstances presented here. Nor does it stand for the extreme proposition that a party with a termination right may never be enjoined from exercising it. New York law is decidedly to the contrary. *See, e.g.*, *U.S. Ice Cream Corp.*, 523 N.Y.S.2d at 870–71 (enjoining the exercise of an explicit contractual right to terminate an exclusive franchise); *Mr. Natural, Inc.*, 544 N.Y.S.2d at 183 (enjoining the termination of exclusive distributorship agreements); *Cut Corners v. Barterama*, 442 N.Y.S.2d 790, 791 (2d Dep't 1981) (enjoining defendant from exercising right to oust plaintiff from operating on defendant's property); *150 East 58th St. Assoc. v. Fletcher*, 316 N.Y.S.2d 644, 646–47 (1st Dep't 1970) (ordering a preliminary injunction tolling a contractual cure period for lease violations).[7]

Both the Commissioner and Nationals complained at the TRO hearing that MASN had manufactured the emergency warranting judicial intervention. But the reality is that the Nationals created this issue by threatening to terminate MASN's rights and the Commissioner exacerbated the problem by threatening to impose sanctions if MASN did not acquiesce. Allowing this litigation to proceed in an efficient but orderly fashion while maintaining the status quo would strike an eminently appropriate balance of the equities among the parties.

[7] At the TRO hearing, the Nationals also asserted that the telecast rights fees they received for the first five years of MASN telecasts—which were fixed by the Settlement Agreement itself—were "clearly below market rates." TRO Tr. 19:14. That does not help them show irreparable harm or that the equities favor them now, and it is also not correct. The financial information submitted to Major League Baseball by each club every year shows that the Nationals' telecast rights fees from 2005 to 2011 were at or above the median, and sometimes near the top third, of all clubs. Further, Baseball itself represented that the telecast rights fees provided for this period in the Settlement Agreement reflected fair market value. *See* Haley Aff., ¶¶ 16–17; *see also* Affidavit of Mark C. Wyche, ¶¶ 4–7.

CONCLUSION

For the foregoing reasons, MASN's motion for a preliminary injunction should be granted.

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Respectfully submitted,

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